No. 15,204

United States Court of Appeals

For the Ninth Circuit

TORA UPSTEAD RYSTAD,
Appellant,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service,
Appellee.

PETITION FOR REHEARING.

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Table of Authorities Cited

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PETITION FOR REHEARING.

To the Honorable Homer T. Bone, Dal M. Lemmon and Frederick G. Hamley:

This petition for rehearing is being presented by counsel who was retained in this case after the decision of this Court was rendered on June 21, 1957. An examination of the record convinces the undersigned counsel that there are at least three reasons why this petition should be granted and the case reheard in this Court.

1. The record before the administrative agency does not contain "reasonable, substantial and probative evidence" (8 U.S.C. 1252[b][4]) establishing that appellant was more than a "nominal" member of the Communist Party (cf. *Rowoldt v. Perfetto,* 228 F.

2d 109 [8 Cir., 1955], cert. granted 350 U.S. 993, ordered re-argued June 24, 1957, 353 U.S..... [1 L.Ed. 2d 1535]).

The Board of Immigration Appeals found that the only witness against appellant was "unable to recall" the times when appellant attended party meetings or paid party dues. This witness "could recall only one meeting attended by him and [appellant] which he could positively state was a closed meeting." It is submitted that proof of attendance at only one Communist Party meeting is not proof by reasonable, substantial and probative evidence of a relationship to the Communist Party which is more than nominal. Cf. *Galvan v. Press,* 347 U.S. 522, 529. The issue of what constitutes more than nominal membership, touched upon in *Galvan,* is now before the Supreme Court in *Rowoldt,* and it is respectfully submitted that this Court should grant this petition and withhold its decision until the Supreme Court has spoken. Counsel for appellant is advised that on June 28, 1957, four days after *Rowoldt* was ordered re-argued in the Supreme Court, the Court of Appeals for the District of Columbia ordered rehearing in *Carlisle v. Brownell,* D.C. Cir., No. 13,711, a case involving issues similar to those presented under this point.[1]

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[1]The order in the *Carlisle* case reads: "It is ORDERED by the Court that the above-entitled case be, and it is hereby, set down for rehearing at a time convenient to the Court after the decision of the Supreme Court in *Rowoldt v. Perfetto,* No. 34, October Term, 1956. Per Curiam."

Identical orders have been entered by the same Court in *Cherner v. Brownell,* No. 12,877; *Grondahl v. Brownell,* No. 13,158; *Hedge v. Brownell,* No. 13,018; *Martinez v. Brownell,* No. 13,014; *Peyro*

2. The administrative agency denied appellant due process of law by upholding the refusal of its hearing officer to require, as specifically demanded by appellant (Transcript of Deportation Proceedings, p. 14),[2] the production of the witness' reports to the Federal Bureau of Investigation. These rulings were made prior to the Supreme Court's decision in *Jencks v. United States,* 353 U.S. 657. There the Court held that in a criminal case the defendant "was entitled to an order directing the Government to produce for inspection all reports of [the witnesses] in its possession . . . touching the events and activities as to which they testified at the trial." (353 U.S. at 668). The Court made clear that this requirement was imposed upon the Government by the due process clause. "Justice", it said, "requires no less." (353 U.S. at 669).

It is submitted that what due process or "justice" requires in a criminal case may not be dispensed with in a deportation case. Cf. *Bridges v. Wixon,* 326 U.S. 135 (1945); *Mangoang v. Boyd,* 186 F. 2d 199 (9 Cir., 1950); *Schoeps v. Carmichael,* 177 F. 2d 391 (9 Cir., 1949).

Since the *Jencks* decision, the District Court for the Eastern District of New York has set aside a prior order of denaturalization and has directed further

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v. Brownell, No. 13,703; *Kochi v. Brownell,* No. 13,264, and No. 13,374; *Estrada-Salazar v. Brownell,* No. 13,015; *Ramirez-Salse v. Brownell,* No. 12,852, and *Larson v. Brownell,* No. 13,039.

[2]This document is a part of Exhibit A attached to the return to the order to show cause herein (R. 15).

proceedings in a case in which it had previously refused to order the production of witnesses' reports to the Federal Bureau of Investigation so that cross-examination might be had thereon. *United States v. Matles,* E.D. N.Y., Civ. No. 13,121, July 11, 1957. Counsel understands that the Attorney General interposed no objection to this order.

Clearly, if due process requires the production of such reports in criminal and denaturalization cases, it can hardly be argued that this requirement is inapplicable to a deportation proceeding which may, and in this case will, result in the loss "of all that makes life worth living" (*Ng Fung Ho v. White,* 259 U.S. 276, 284).

3. The administrative agency denied appellant due process of law by holding that its hearing officer could draw an adverse inference from appellant's silence. This ruling was made prior to the decision of the Supreme Court in *Gruenwald v. United States,* 353 U.S. 391, which, in reversing a conviction because the prosecutor had inquired of the defendant about his prior invocation of his Fifth Amendment privilege against self-incrimination, emphasized that "no implication of guilt could be drawn from [the defendant's] invocation of his Fifth Amendment privilege . . . " (353 U.S. at 421). The Court cited with approval Dean Griswold's observations that

> "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit

perjury in claiming the privilege." (353 U.S. at 421.)

The Court gave the dispositive answer to this claim by referring to its earlier decision in *Slochower v. Board of Higher Education,* 350 U.S. 551, where it had said:

> "The privilege serves to protect the innocent who otherwise might be enmeshed by ambiguous circumstances." (350 U.S. at 557-558.)

Since the decision in *Gruenwald,* and in reliance thereon, the Court of Appeals for the Tenth Circuit has reversed a conviction because the prosecutor was permitted to bring to the jury's attention, through the cross-examination of defense character witnesses, the fact that on a prior occasion the defendant had refused to answer questions on the ground that his answers might incriminate him. *Travis v. United States,* 10 Cir., No. 5379, July 15, 1957. There the Court said:

> "One who claims the rights and privileges of the Constitution most certainly does not exhibit a character defect of any kind and, if one who lawfully asserts the shelter of the Fifth Amendment becomes, in so doing, a person of guilt or a perjurer in the minds of some, the shame lies with those who misunderstand and not with him who is entitled to protection."

We submit that the same reasons which prohibit a Court in a criminal case from drawing adverse inferences because of a defendant's prior reliance on

his Fifth Amendment privilege, also prohibit an administrative agency from drawing such inferences in a deportation case in which the respondent [appellant here] refuses to testify, basing her refusal upon the due process clause (Transcript of Deportation Proceedings, p. 3).

This is particularly so on the facts of this case. For the record here reveals that after appellant learned that an adverse inference had in fact been drawn against her, she moved to reopen the record so that she could testify and rebut that inference (Motion to Reopen Hearing filed July 28, 1955, and Order thereon dated September 15, 1955).[3] The denial of this motion underlines the extent to which appellant was deprived of due process of law on this issue.

CONCLUSION.

For the reasons

1. That there is no substantial, reasonable and probative evidence of more than nominal membership in the Communist Party;

2. That the administrative agency denied appellant due process of law by refusing to order the production of the Federal Bureau of Investigation reports requested; and

3. That the administrative agency denied appellant due process of law by drawing an ad-

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[3]This document is a part of Exhibit B attached to the return to the order to show cause herein (R. 15).

verse inference from her refusal to testify and by denying her an opportunity thereafter to rebut that inference,

the judgment of this Court affirming the proceedings below was in error, and this petition for rehearing should be granted.

Dated, San Francisco, California,
August 15, 1957.

Respectfully submitted,
GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
NORMAN LEONARD,
Attorneys for Appellant and Petitioner.

Certificate of Counsel.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
August 15, 1957.

Norman Leonard,
Of Counsel for Appellant and Petitioner.